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No. 93-1318

In The

Supreme Court of the United States

October Term, 1993

INTERSTATE COMMERCE COMMISSION,

Petitioner,

v.

TRANSCON LINES, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICUS CURIAE OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a duly published and effective tariff can be rendered null and void, and a bankruptcy trustee enjoined from collecting undercharge monies from shippers for the benefit of creditors, by the Interstate Commerce Commission's enforcement of its credit regulations.

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INTEREST OF AMICUS CURIAE

The International Brotherhood of Teamsters ("IBT") is a labor union of approximately 1.4 million members, many of whom are employed in some aspect of the motor carrier industry. Transcon Lines ("Transcon"), a respondent herein, operated as a motor common carrier under authority issued by the Interstate Commerce Commission ("ICC" or "Commission") until 1990 when it went bankrupt. The Transcon bankruptcy resulted in hundreds of IBT members losing their jobs. In addition, when Transcon went into bankruptcy it owed its employees and their

pension funds millions of dollars. Indeed, Transcon's former employees and their pension funds are the largest creditors of the Transcon estate.[1]

The undercharge claims herein at issue brought against shippers by Transcon's trustee are the estate's major, if not only, asset and the collection of these claims thus represents the only hope which these former employees have of recovering any portion of the monies they are owed. As shown below, the shippers, which include some of the largest companies in the country, failed to pay the freight charges provided for in lawful tariffs published by Transcon and filed with the ICC. Their actions contributed to Transcon's financial problems and its ultimate demise. Now, with the assistance of the ICC, they are fighting against the trustee's collection efforts which have been undertaken on behalf of innocent creditors. On behalf of Transcon's former employees and other similarly situated creditors of other bankrupt motor carriers, the IBT is participating herein as *amicus curiae* in support of the respondents.

[1] Former employees are owed more than $23 million in back wages, severance and vacation pay. A copy of the proof of claim filed on behalf of Transcon's former employees was attached as Appendix A to the IBT's brief in support of the Respondents in Docket No. 92-1547. Br. Amicus Curiae the International Brotherhood of Teamsters Supp. Res't at 1a-6a. The Central States, Southeast and Southwest Areas Pension Fund is owed almost $16 million by Transcon. See Appendix B to IBT's brief in support of the Respondents in Docket No. 92-1547. Br. Amicus Curiae the International Brotherhood of Teamsters Supp. Res't at 7a-9a.

STATEMENT

This case involves misguided efforts by the ICC to prevent Transcon's trustee in bankruptcy from recovering freight charges owed by shippers who failed to pay filed tariff rates as required by the Interstate Commerce Act.[2] Transcon's duly filed and published tariff provided shippers a discounted rate if they paid freight charges within 90 days of shipment. Failure to pay within the 90 days resulted in the application of otherwise published non-discount rates.[3] There is no dispute regarding the clarity of this "loss of discount" provision, nor has any party raised a question as to it being properly filed with the ICC.

After Transcon went into bankruptcy, an audit of its records showed that, notwithstanding the tariff's unambiguous terms, many shippers had paid (or were seeking to pay) discount rates long after the 90-day period had elapsed. On behalf of creditors of the estate, the trustee has attempted to recover the applicable undercharges from the shippers, *i.e.*, the difference between the discount and non-discount rates. The ICC has sought to

[2] The duty of a carrier to collect and a shipper to pay filed tariff rates, sometimes referred to as the "filed rate doctrine", has and continues to be a clear requirement of the Interstate Commerce Act. 49 U.S.C. §§ 10761(a) and 10762(a)(1).

[3] Transcon's tariff provided in pertinent part:

1. [D]iscounts * * * shall apply when tariff charges are paid within 90 calendar days from date of shipment.
2. * * * This rule simply establishes a condition precedent for the application of the specific tariff provisions described in paragraph 1 above.

enjoin the trustee from collecting these undercharges on the basis that Transcon failed to comply with the Commission's credit regulations.[4]

This case has been before this Court once before at which time it granted certiorari and remanded for further consideration in light of its decision in *Reiter v. Cooper*, 113 S.Ct. 1213 (1993). *See ICC v. Transcon Lines*, 113 S.Ct. 2955 (1993). On remand the court of appeals concluded that its earlier decision was in complete accord with this Court's holding in *Reiter*. *ICC v. Transcon Lines*, 9 F.3d 64 (9th Cir. 1993). Thereafter the ICC filed a petition for a writ of certiorari and the Court granted certiorari on April 18, 1994. ICC Br. at 1-2.[5]

SUMMARY OF ARGUMENT

On remand, the Ninth Circuit correctly held that its earlier decision, in which it found that a failure to comply with certain technical ICC credit regulations did not prevent the trustee from collecting Transcon's filed tariff rate, is consistent with this Court's decisions in *Reiter*, *Southern Pacific Transportation Co. v. Commercial Metals*,

[4] The ICC has alleged that Transcon's original bills did not advise shippers of the consequences of late payment, in violation of 49 C.F.R. 1320.3(c); revised bills were not issued until after the 90-day period provided for in 49 C.F.R. 1320.2(g)(2)(vi); and the trustee sought to apply the loss-of-discount provision on an aggregate basis, contrary to 49 C.F.R. 1320.2(g)(2)(iii).

[5] Citations to the Brief for the Petitioner are referred to as "ICC Br. at ___."

456 U.S. 336 (1982) and *Maislin Industries, U.S. Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990).

If Transcon's loss of discount provisions are voided, all shippers that transported cargo with Transcon would receive the discounted rate regardless of whether they had paid their freight charges within the required 90 days. As a result, those shippers who had paid their freight charges within 90 days would be prejudiced vis-a-vis those shippers who chose to ignore the 90-day requirement. The filed rate would be negated in that the published condition precedent for application of the discount rate, i.e., payment within 90 days, would be ignored. Adopting the ICC's position would in fact sanction the type of discriminatory conduct that the Commission's credit regulations expressly prohibit (49 C.F.R. § 1320.2(h)) and would also sanction the ICC's use of its injunctive powers in a discriminatory manner in clear violation of the Interstate Commerce Act. See 49 U.S.C. § 11702(a)(4).

The ICC's efforts to enjoin Transcon's trustee from collecting the filed rate flies in the face of this Court's decision in *Commercial Metals*, and its efforts to avoid the plain language of *Commercial Metals* fall short of the mark. Further, the collection of the filed rate will not benefit Transcon as the Commission and its amici have argued. Rather, all monies collected will in some part fund the claims of Transcon's unsecured creditors. The equities of this case, as the Ninth Circuit has recognized, are not with the shippers that have violated Transcon's tariff, but rather rest with Transcon's innocent unsecured creditors who have borne the greatest loss.

ARGUMENT

1. The Ninth Circuit's Decision Prevents Discrimination Amongst Shippers.

The ICC argues that its efforts to enjoin the collection of the non-discounted rate would not undermine the filed rate doctrine because the trustee would still be able to collect the filed discounted rate and interest charges "due upon delivery". ICC Br. at 12 and 26-27. The ICC also characterizes the non-discounted rate as merely "a liquidated damage provision" or "collection charges" for failure to meet the credit terms and thus the failure to apply the non-discounted rate will not "interfere" with the filed rate doctrine at all. ICC Br. at 27. This characterization ignores the plain and unambiguous language of the tariff. While it is perhaps understandable why the ICC would advocate such a position, express terms of a tariff cannot be so cavalierly set aside. The discounted rate offered by Transcon was available only if payment was made within the 90-day period specified. Shippers were, in effect, given an incentive to pay within this time period. Once the time elapsed, the discounted tariff rate no longer was applicable. To apply that discounted rate in a manner that contradicts the terms governing such rate would violate Transcon's tariff and the filed rate doctrine which requires strict adherence to published tariff terms and conditions. 49 U.S.C. §§ 10761(a) and 10762(a)(1). See also *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, No. 93-356, slip op. at 12 (June 17, 1994).

As the Court has repeatedly held, the filed rate doctrine is "utterly central" to the administration of the Interstate Commerce Act and without it, it would be

"monumentally difficult to enforce" the statute's non-discriminatory and reasonableness requirements. *Maislin Industries, U.S. Inc. v. Primary Steel, Inc.*, 110 S.Ct. at 2769; *Southern Pacific Transp. Co. v. Commercial Metals Co.*, 456 U.S. 343-344; *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, No. 93-356, slip op. at 12 (June 17, 1994). Here, the ICC is seeking to enjoin the collection of the applicable rate by labelling a fundamental portion of Transcon's tariff as merely "collection charges." The fact is, no matter what the non-discounted tariff rate is called, Transcon's tariff specifically provided that if the shipper did not pay within 90 days of shipment it would be required to pay the non-discounted tariff rate.

Refusing to enforce Transcon's loss of discount provisions – the filed rate – would not only be contrary to the filed rate doctrine, but it would also run afoul of the well-established principle that enforcement of tariff terms is required to prevent discrimination between shippers.

> This rule of strict adherence to statutory standards is in line with the historic purpose of the Interstate Commerce Act – to achieve uniformity in freight transportation charges, and thereby to eliminate . . . discrimination and favoritism . . . .

Southern Pacific Transp. Co. v. Commercial Metals Co., 456 U.S. at 344. See also, *Maislin*, 110 S. Ct. at 2766; and *MCI Telecommunications Corp.*, slip op. at 12. Here, if the Commission's arguments prevail and Transcon's loss of discount provisions are voided, discrimination would occur because all shippers utilizing Transcon's services would receive the discounted rates, regardless of when the freight charges were paid. Shippers who paid in more than 90 days would be given preferential treatment by

being granted the same terms as shippers who paid in less than 90 days. This is exactly what the Transcon tariff and the ICC's credit regulations were intended to prevent. Indeed, the ICC's regulations pertaining to loss of discount provisions specifically provide that:

> Tariff rules published pursuant to paragraphs (a), (c) and (j) of this section shall not result in unreasonable discrimination among shippers.

49 C.F.R. § 1320.2(h). Furthermore, Congress specifically provided that:

> A common carrier . . . may not subject a person . . . to unreasonable discrimination

49 U.S.C. § 10741(b). Notwithstanding these clear statutory and regulatory pronouncements, the ICC now chooses to ignore the discriminatory consequences of its arguments and thereby unduly prefer late-paying shippers.

Not only do the ICC's own credit regulations prohibit discrimination among shippers, but, as the ICC concedes, Congress specifically prohibited the Commission from using its injunctive powers "under a provision of this subtitle governing the reasonableness and discriminatory character of rates." 49 U.S.C. § 11702(a)(4). ICC Br. at 13. Since the injunction being sought by the ICC would cause discrimination to occur, its action herein against the trustee cannot be permitted.

2. The Ninth Circuit's Decision Prevents the ICC From Undermining the Filed Rate Doctrine.

The Commission's efforts to enjoin Transcon's trustee from collecting the filed rate are contrary to the Court's holding in *Commercial Metals*. In *Commercial Metals*, the Court stated as follows:

> [t]he carrier's . . . violation of the credit regulations are insufficient . . . to overcome the time-honored rule that under such circumstances, no "act or omission of the carrier (except the running of the statute of limitations) will estop or preclude it [the carrier] from enforcing payment of the full amount by a person liable therefor."

Commercial Metals at 352 (citations omitted). Notwithstanding the holding of *Commercial Metals*, the ICC maintains that Transcon's violations of the credit regulations preclude it from collecting the filed rate. In seeking to avoid the conflict with the holding of *Commercial Metals*, the Commission relies upon the Court's observation that the ICC has the authority "to seek a federal court injunction requiring a *carrier* to comply with the [credit] regulations." *Commercial Metals* at 349 (citations omitted) (emphasis added). The ICC's reliance upon this statement is misplaced and cannot support an injunction prohibiting the trustee from pursuing to collect duly owed tariff charges from shippers. In this regard, the injunction being sought in no way seeks to enforce Transcon Lines' compliance with the regulations. Indeed, this cannot possibly be done since Transcon Lines ceased operating in July of 1990. Rather, the Commission is seeking to impose a forfeiture of the filed rate on the trustee representing Transcon's creditors.

The ICC's injunctive powers as described in *Commercial Metals* were not intended to encompass actions which would preclude enforcement of the filed rate. The holding in *Commercial Metals* was just the opposite; the filed rate must be paid notwithstanding non-compliance with credit regulations. *Commercial Metals* at 352. The injunctive authority contemplated by the Court in *Commercial Metals* is the type of action involved in *ICC v. All-American, Inc.*, 505 F.2d 1360 (7th Cir. 1974). In *All-American*, which was cited and relied upon by the Court in *Commercial Metals*, the Seventh Circuit upheld the ICC's use of its injunctive powers to prohibit All-American, Inc. "from extending credit to shippers who it knows, or should know, will not pay its tariff charges within a seven day period . . . " Id. at 1361. There was absolutely no mention of voiding the carrier's filed rate in *All-American*.

Neither the Seventh Circuit in *All-American* nor the Supreme Court in *Commercial Metals* authorized the ICC to use its injunctive powers to abolish the filed rate where a carrier violated its credit rules. Yet this is precisely what the ICC is seeking to do in the instant matter. The ICC's unilateral expansion of its injunctive powers to circumvent the core holding of *Commercial Metals* is meritless and should be rejected as such.[6]

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[6] The Commission has also argued that unless it is entitled to enjoin Transcon's trustee from collecting the filed rate, it will be unable to enforce the credit regulations since the alternative remedies are neither "logical nor effective against a bankrupt carrier . . . " ICC Br. at 23. This reasoning ignores the fact that voiding the filed rate will not punish Transcon or deter Transcon from further violating the credit regulations. Transcon has ceased to exist. All that remains are the interests of Transcon's unsecured creditors. Punishing these innocent creditors will not achieve any of the goals of the credit regulations. Accordingly, the IBT's efforts are not only misdirected they also are inequitable.

3. The Ninth Circuit's Decision Upholds The Rights and Interests of Transcon's Creditors.

In their efforts to slant the equities of this case in their favor, the ICC and its supporting amici would have this Court believe that the collection of the filed rate is the final element in an elaborate trap that was masterminded by Transcon. ICC Br. at 16.[7] Accordingly, the ICC and its supporters contend that *Transcon* should not benefit from collecting the filed rate from *innocent* shippers where Transcon did not comply with the ICC's credit regulations. In doing so, the ICC asks this Court to ignore the plain consequences of this proceeding, namely, that any amounts collected would go to Transcon's unsecured creditors not to Transcon.

The Ninth Circuit recognized the realities of this case in its earlier decision when it concluded:

> The equities here are not necessarily with the late-paying shippers. They enjoyed an extension of credit by the carrier while the carrier became insolvent. It is not unfair to make them now contribute to the payment of the carrier's unsecured creditors.

ICC v. Transcon Lines, 990 F.2d 1503, 1515 (9th Cir. 1992). Far from being innocent, these shippers wilfully declined

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[7] Brief of the Health and Personal Care Distribution Conference, Inc., the National Industrial Transportation League and the National Small Shipments Traffic Conference, Inc. at 10.

to pay discounted freight charges within the published 90-day period. They took improper advantage of Transcon's extension of credit. As a result, Transcon's cash flow was severely jeopardized and it was forced into bankruptcy. Hundreds of people were put out of work. It is these employees together with Transcon's other unsecured creditors that would recover part of the monies owed to them if the filed rate is collected. Transcon would gain nothing.

As a matter of law and equity, the late-paying shippers should not be allowed to escape their obligations under Transcon's filed rate to the detriment of Transcon's innocent creditors.

CONCLUSION

For the foregoing reasons the Ninth Circuit's decision should be affirmed.

Respectfully submitted,

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